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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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THE AUTHORS GUILD, INC. et al.

Plaintiffs

v. 11 CV 6351 (HB)

HATHITRUST, et al.

Defendants

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New York, N.Y.
August 6 2012
3:15 p.m.

Before:

HON. HAROLD BAER, JR.

District Judge

APPEARANCES

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(In open court)

THE DEPUTY CLERK: Authors Guild v. HathiTrust.

Counsel for plaintiffs, state your name for the record.

MR. ROSENTHAL: Edward Rosenthal from Frankfurt Kurnit Klein & Selz. With me are my colleagues Jeremy Goldman and Adam Nelson, a summer associate in my office.

THE DEPUTY CLERK: Counsel for defendant.

MR. PETERSEN: Good afternoon, your Honor. Joe Petersen for defendant libraries along with my partner Joe Beck, my colleagues Andrew Piquignot and Allison Roach.

THE DEPUTY CLERK: Anybody else?

MR. GOLDSTEIN: For the defendant intervenors, your Honor, good afternoon. Daniel Goldstein of the firm of Brown Goldstein & Levy. With me is the attorney Robert Bernstein of the law offices of Robert Bernstein.

THE COURT: I have just a couple of housekeeping thoughts. I know you have fully briefed motions for judgment on the pleadings. They are unlikely to be resolved individually, and will likely be folded into these motions for summary judgment, for which my guess is we have several thousand pieces of paper, it seems enough to me. And, indeed, I don't think that will prejudice anybody.

There was another concern at the outset that I thought I would get your responses to. For some reason the plaintiff

was agreeable to have one of the amici and not the other? I really was sort of unclear as to why that would be. Maybe you could just spend a moment telling me why that is unless you've re-thought your position.

MR. ROSENTHAL: Your Honor, we do not have any objection to any of the amici.

THE COURT: There are a variety of motions but I think probably I would be best off if we heard from plaintiff first. Then we will get to everybody else in due time. You can approach your argument anyway you'd like, but I would appreciate it if you went to the podium to do it.

MR. ROSENTHAL: Thank you.

Your Honor, defendants in this case have admitted to having scanned, copied and given to Google more than 10 million books, more than 7 million of which are protected by copyright in the United States. They admit that among those books are copyrighted books owned by the individual plaintiffs in this action, as well as books owned in some instances by actually owned by certain of the associational plaintiffs and books owned by members of the associational plaintiffs.

The scope of defendant's copying effort is so overwhelming, the defendants have taken the position in their papers -- and this is particularly in their opposition to plaintiff's motion for summary judgment -- that they could not possibly have spent the time to determine whether there was any

particular reason to copy any particular work because it would have taken much too much time to do so.

So, instead of looking to see whether there was a permitted purpose under Section 108 of the Copyright Act or under Fair Use, they worked it out with Google so that Google, for all intents and purposes, back trucks up to library loading docks, copied every book in buildings, in a group of different libraries without any discrimination, any pre-thought whatsoever.

Then Google -- and I think this takes real chutzpah, your Honor -- they argue that plaintiffs cannot possibly show market harm in this case because they took so many books that they could not possibly ever have paid for them. In other words, they said, how could there be a market for 10 million books, we never could have paid to digitize and copy 10 million books. It would have cost us hundreds of millions of dollars to do so.

While it's perfectly clear that there are all sorts of ways that you can buy books -- and that is what libraries are partly in the business of doing -- you can buy books from authors, publishers, rights organizations like the CCC in the United States, or in case of foreign organizations, there are mechanisms set up to allow for rights to be bought, but instead of that -- and you can buy journals. If you subscribe to a journal, you work it out with the journal. You get certain

rights. You can make copies of it. A certain number of people can use it. They say, no, we wanted every book in our library so we don't have to pay for any of it, and you can't show market harm because there is no market for copying every book in the library.

In making these arguments, defendants completely ignore the fact that it is authors, our clients and many, many other authors who created the works that fill the libraries of our country, fill the HathiTrust database, and provide the content that the users use. Authors make money selling books, including libraries. There are lots of authors for whom -- academic and other authors for whom libraries are a major source of sale.

Defendants also ignore the fact that it is authors who have the right to decide when and whether their books should be copied. In fact, one of the fundamental rights in Section 106 of the Copyright Act is that the owner of a copyright not only has the right to do things like make copies and make derivative works, it has the right to authorize someone else to make copies.

So defendants have simply overridden the author's right to decide whether they want the books to be digitized, whether they should pay for them --

THE COURT: Well, doesn't a number of books, the backing up of the trucks to the loading docks, does that have

any effect on whether or not they comply with the Fair Use Doctrine?

MR. ROSENTHAL: It has a major impact on whether they complied with Section 108 of the Copyright Act.

THE COURT: How about 107?

MR. ROSENTHAL: Your Honor, there is no case in the Second Circuit where somebody has indiscriminately made copies of millions of books and then said after the copying is made -- multiple copies are made, after they've given a copy to a commercial user, they then say, oh, that particular book, there's a Fair Use for copying that particular book because maybe there's some user who might want to use that book.

THE COURT: So you're saying it's the way in which the book comes is sold to the public, the position and terms of whether they've told people beforehand that determines Fair Use? I might not be stating that terribly well, but you may get my drift. You may not.

MR. ROSENTHAL: I'm not sure I do, your Honor, but what I'm saying is, first of all, our position in this case is that Congress in Section 108 of the Copyright Act -- I'll talk about Fair Use in a second -- in 108 made very, very specific rules about when books could be copied, digitally or otherwise. It had to be only under certain circumstances when there was a lost book or a need to replace a book or a deteriorated book. There were only a certain number of copies could be made, and

they had to look first to see whether they could buy a book on the market first. They did none of that, your Honor, so the backing up by the Trust --

THE COURT: So you believe without -- I don't want to cut you off, but you're sort of saying it, if I follow you, that without having complied with 108, 107 doesn't really matter.

MR. ROSENTHAL: There are circumstances where 107 might matter in the case of an individual book, perhaps there would be some situation where Fair Use would still govern even if somebody hadn't literally followed the exact provisions of 108. But 108 was Congress's way, after years and years of debate with all of the stakeholders at the table -- authors, publishers, libraries, archives -- all of the users at the table Congress got together and said how are we going to permit libraries and what circumstances to make copies of works? That's what 108 was.

So, for defendants to say that you can now throw out all of 108 because it's all a Fair Use simply doesn't work under the Copyright Act, the legislative history or just kind of common sense, your Honor, because it just subsumes the entire rule. If when Congress said you can only make limited copies for limited purposes under limited circumstances and you're now allowed to say we can copy every book without even looking, without checking, that would completely eviscerate the

whole purpose of Section 108.

Your Honor, I am sure in a few moments -- defendants have a presentation for us, and I am sure we are going to see some of the things that the HathiTrust Digital Library, which is what they call the place they put all these books could be used, as an index so that you can find books, so that if somebody using the index can find a book, find out what library it is

THE COURT: Isn't that true? Isn't that what they did?

MR. ROSENTHAL: That is partly what they did, your Honor. But what they are not going to show you is how there are multiple copies of these works made sitting on databases attached to the internet. What they're not going to show you is how they gave Google a copy of every single one of these works. What they're not going to show you is how a work with a switch, you can switch the designation of a book. I am using the word switch a little bit metaphorically, but you can switch a book from not being viewable to being viewable by the public, which is what defendants intended to do in their orphan works program where they intended to make works available for viewing and downloading if they determined it was a work where you couldn't find the author.

So, while there clearly are uses of the HathiTrust database that do not necessarily cause extreme harm or concern,

they're not showing you how the fact that they made the HathiTrust database is in fact the act of copying. In fact, your Honor, under the case law, it's not the fact that some end user might some day be able to make good use of a work that's the critical test. The critical test is whether the copier has a Fair Use in making that copy. Every situation, there's going to be somebody, except make just blatant piracy, there is going to be somebody out there who could possibly make use of a work that was made out of copyright infringement.

THE COURT: I have not memorized 108, but my understanding of all of what you said may be so about it, but that Congress also indicated that 108 was in no way to affect Fair Use. Am I making that up or dreaming it?

MR. ROSENTHAL: There is a provision that said that it does not affect plaintiff -- it does not affect the rights under Section 107, the Fair Use section, but that doesn't mean that you get to simply ignore 108 completely and make copies of millions of books.

THE COURT: What does it mean?

MR. ROSENTHAL: It means that there may be situations where a library could make a copy of a book for some reason or other where it would not necessarily be an infringement of copyright to do so. For example, if there were some sort of exhibition going on in the library and somebody wanted to make a digital display so they could put it in some sort of

exhibition. I'm just throwing that out there without much thought. Or some other situation where there might be some reason to use part of a work under a Fair Use circumstance, and there might be some reason why there was a need to use some part of some work, but not millions and millions of books without looking, without checking.

That upsets the balance that Congress enacted in Section 108; and that balance is what Congress has done again and again when it's been faced with the intersection of new technologies and existing owners. It has to weigh the balance of the owners with a new technology.

THE COURT: I understand your argument -- I think I do -- but how would purchasing authorized copies of additional works, electronic war print, have allowed defendants to create a searchable database or provide access to copyrighted works to blind students?

MR. ROSENTHAL: How would the defendants --

THE COURT: I mean, you argue that the defendants can't make unauthorized copies to save the expense of purchasing authorized copies, right?

MR. ROSENTHAL: Yes.

THE COURT: So, I guess the question is, how would purchasing authorized copies of additional works have allowed defendant to create a searchable database to provide access to copyrighted works for blind students, for instance?

MR. ROSENTHAL: Well, the issue of the blind is governed by another section of the copyright law, Section 121, which again very carefully delineates the circumstances under which an authorized entity -- and the defendants here are not an authorized entity -- can make copies of works in certain formats for use by visually disabled students or otherwise.

And, again, in that instance, Congress weighed the rights of the various stakeholders, including profound concerns over security which were governed by saying it has to be in certain specified formats, and the interest of the visually disabled and came up in Section 121 with a mechanism for deciding when and how that could be allowed.

Also, defendants could have gone to individual rights holders and asked individual rights holders for permission to have their books made available under certain circumstances for visually disabled students. They didn't do that. They just copied everything. Had that done that --

THE COURT: You think that would have made it OK if they had gone and asked?

MR. ROSENTHAL: If they had asked permission of rights holders and rights holders gave --

THE COURT: I don't even think that's conceivable, but I gather you do.

MR. ROSENTHAL: How do I think it's conceivable? It might be difficult for them to get every single author of every

single book to agree to do that, but they could have asked lots of different organizations, lots of different authors, lots of different publishers for that right. Authors traditionally have provided works for visually disabled people for no charge. There are provisions in publishing agreements allowing publication in Braille and other formats, but just because you can do it doesn't mean you're allowed to do it. In those circumstances, there would have been --

THE COURT: Just because you can ask doesn't necessarily mean you have to ask.

MR. ROSENTHAL: Well, that's true, your Honor, but the -- I'm sorry, I lost my train of thought.

It is true, but, your Honor, if somebody had asked for permission for visually disabled to use under certain circumstances with certain accountability, such as careful security provisions, making sure the formats were correct, making sure that there were protections against unauthorized use, then that might have been worked out.

In fact, in the proposed settlement of the *Google Books* case, which was rejected by the Court, but which was backed by the visually disabled, including the National Federation for the Blind as well as the Authors Guild, there was a very detailed mechanism for making books available for visually disabled users.

So it's not that it's impossible to do it. It may be

impossible to do on a scale that the defendants want here which is every single book ever published.

THE COURT: I'm not sure that the every single book ever published has much to do with my concern. You have to read these laws, it seems to me, in conjunction with other laws. If you do read the copyright law and juxtapose it with the American Disabilities Act, it seems to me that you now have the ability to provide equal access to the blind, and that you have an obligation to do so, or the defendant has an obligation to do so. What do you think about that?

MR. ROSENTHAL: I think there is a problem with that argument which basically says that once you've done something illegal, like make multiple copies of all of the books, then you're going to argue well now that we've done this, we have to make it available to everyone.

THE COURT: I didn't think this was their argument.

MR. ROSENTHAL: I think that basically is, and under the ADA, every entity with 15 or more employees would be required then to make their books available to visually disabled if they were there. So, once the use has been made, once you've made the copies, then you have to provide them to the visually disabled.

THE COURT: But that's only if you've broken the law. My concern is whether looking at the ADA and juxtaposing it with your concerns, they did break the law or they didn't. It

seems to me that there is a good argument to the effect that they didn't break the law in the first place and then you wouldn't have any argument at all.

MR. ROSENTHAL: If they didn't break the law by making the copies --

THE COURT: Yes.

MR. ROSENTHAL: -- giving it to Google.

THE COURT: Yes.

MR. ROSENTHAL: Keeping them on their servers, doing the orphan works program.

THE COURT: Mr. Rosenthal, this is not a trick question. All I'm trying to understand is how you interplay your concerns about the copyright law with Congress's concerns about the Americans with Disabilities Act. And I don't know how you do that. It's just a question.

MR. ROSENTHAL: Your Honor, I understand the question, but the question really is which does the tail wag the dog or does the dog wag the tail. Here, the copying of all these works is illegal. Now it exists, and now they're saying, well, since we have this gigantic database, we have to make it available for the visually disabled. That's essentially their argument. Our position is they had no right to do this in the first place.

THE COURT: I think I got it.

MR. ROSENTHAL: Your Honor, none of the authors in

this case, none of the organizations have any interest in depriving visually disabled people of access to works. The question is under what circumstances do we do it, under what accountability and under what security.

And it's interesting, your Honor, that while we hear a lot about the visually disabled in this case, there are only 32 registered visually disabled users at the University of Michigan who even signed up for the years the HathiTrust has been in place, who even signed up for the right to do this. So we're not disrespecting that right. It's incredibly important to them. This is not really what this case is about.

THE COURT: The fact that they didn't sign up doesn't really mean that there aren't an awful lot more of them.

MR. ROSENTHAL: I imagine there are a lot more of them, but they're not pining for use of the HathiTrust digital database, despite all we saw in the papers what a wonderful tool it is.

THE COURT: You may well be right about that. I don't really know. My guess is this is an advantage that they didn't have before, so that all of them would, if they were aware of it, at least sign up for the idea that they should have it. Be that as it may --

MR. ROSENTHAL: Your Honor, when we talk about -- I think our papers address the 108 issues. We've briefed it more than once, to put it mildly, about how the defendants have

walked all over the requirements of Section 108. So I want to talk about a little bit about Fair Use.

Our position is there is no Fair Use justification for making millions of copies, but if you look at the Fair Use factors, the first and most critical factor is, is this transformative. In this case, the cases cited by defendants from the Second Circuit are all the kind of cases that we've all had, Fair Use cases we've all had for years. It is the use of a piece or maybe a couple of pieces of preexisting material in a completely different work.

For example, they cite the *Bill Graham Archives* case over and over again. That case involved seven thumbnail-sized pictures of Grateful Dead posters in a 400-plus page book with 2,000 images, *A Biography of The Grateful Dead*. They cite your Honor's *Hofheinz* decision which was the use of 40 something seconds of clips from horror movies and a documentary about horror movies. Those are the typical Fair Use cases where somebody uses one piece of preexisting material or a few pieces in some completely new work. Those cases are not cases like this where somebody is taking millions of copies.

And there is nothing transformative about what the defendants did here. I'm talking about what the defendants did, not some theoretical end user. Defendants' libraries are in the business of buying books for preservation and collection purposes. They are the centers of education. They buy books

from authors. Authors sell books. Many authors sell books, more books to libraries more than anybody else.

The HathiTrust digital archive makes additional copies of books for exactly that same purpose -- to preserve and to collect. That's not transformative. Just as the use in the *MP3.COM* case in this district where defendants made MP3 copies of CDs, that's not transformative because you're simply taking the existing work, you're putting it into a different format but the purposes of the use is exactly the same thing. It's not transformative.

The case that should be governing this court is the *Texaco* case, *Geophysics v. Texaco* where Texaco made multiple copies of scholarly journals that they had bought for preservation and archival purposes. The Court said that's not Fair Use. It's not transformative. You're keeping them for the exact same purpose

THE COURT: What do you think about *Perfect 10 v. Amazon*? Doesn't that seem to you to be fairly close to this fact pattern? Maybe not the gigantic numbers here, but certainly wholesale copying.

MR. ROSENTHAL: *Perfect 10*, your Honor, is a case that has similarities but is different in some incredibly important ways. The most important way is that in that case and the other Ninth Circuit cases that dealt with search engines, in those cases, the works were already on the internet in digital

form. So, when Google does its search engine and makes thumbnails so people can find and point users to where it already is on the internet, the works are already there. The rights holders have authorized the works to be on the internet. They are there.

The situation is very, very different with books. Authors spend years creating books, while most of what's on the internet may be -- not everything -- very quickly. Authors do not permit digital copies of their work to just sit on the internet where they can be used and copied and viewed by people without payment.

So, the whole underlying premise of *Perfect 10* and the other search engine cases are that was a means by which thumbnails were made to find on the internet something that was already there. In this case, the books are not already on the internet. They're not available. There is no digital copy --

THE COURT: Here the concept was, as it was in *Kelly*, as I understand it, and I am not a big expert in this area, as you can probably glean from my questions, it seems to me that what was happening in *Kelly* was not far off here. In other words, there was found to be transformative and all there was copying to produce exact replicas just like this of artistic works and displayed in thumbnail form on the internet so as to facilitate searches, which is essentially what I thought the defendant was doing here, was putting up enough to facilitate a

search.

MR. ROSENTHAL: So there are several distinctions, one of which was the distinction about the works in *Perfect 10* or *Arriba* were already on the internet.

THE COURT: I didn't forget what you said.

MR. ROSENTHAL: Also in those cases, the works were copied for purposes of making thumbnails, and then they were -- at least in one case explicitly, but I think it's true in all of them -- discarded. So nobody kept multiple copies of the entire works on servers where they would be theoretically available and pose a security risk for users everywhere. The thumbnails are not --

THE COURT: I'm not sure what the security risk that you keep talking about is.

MR. ROSENTHAL: Your Honor, so there are multiple copies of the HathiTrust database sitting on servers at the University of Michigan and University of Indiana. There are a number of, I think over 90, people at those universities who have access to that database and can view full -- can view those files, both the image and text files, fully. So there is a risk there. There is the risk of hacking or otherwise theft into the libraries.

Every day we're reading in the papers situations where, the recent one with Linked-In and there have been issues at the major technology companies. People are hacking into

systems and stealing digital works.

There was the situation at MIT referred to in our papers where somebody broke into the MIT library, with the idea of stealing millions of books and making them publicly available on a web site.

So, unlike images in situations like *Arriba* or *Perfect 10* where there is already an imagine on the internet and all Google is doing is pointing you to that, here they are putting the works of authors at a significant security risk because with a thing like a book, once it's out, if books start finding their way onto the kind of peer-to-peer files sharers, the Napsters of the world, the genie can't be put back in the bottle, and the damage to authors can be tremendous. All of that is done without the authors having a say in whether or how that is going to be done.

When Congress passed 108 and Section 121, it thought very carefully about the market for the books and the security risks. That is why Section 108 was amended to allow digital copying under very specific limited circumstances as part of the DMCA with a balance with the rights of libraries and archives and the concerns about marketing security of the authors.

That tension has been going on since at least 1961 when the Copyright Act of 1976 first began to be considered when the various stakeholders argued about the issues of the

libraries being able to make full copies and what the implications of that were going to be for market and security purposes. 121 and 108 reflected Congress's balancing of those interests. Defendants have upset that balance.

So I just wanted to talk for a moment about market harm because defendants, and we touched on already defendants, argue that, as I started at the very beginning here, that there is no market for any of -- there can't be a market because the use was so great that they couldn't possibly have afforded to pay for all those works or it would have been unwieldy to do so.

Defendants in this case have put forth declarations from numerous authors and rights organization representatives that show that authors are damaged because they sell books to libraries and this took sales away, because they have the right to decide when they do and don't want digital copies to be made of their works, because there are merging works, there are merging markets for digital works that are popping up all the time now. As the world has changed and more and more people are going back and looking at works that may be out of print or may not be selling and making them digitally available, defendants are threatening that market and because of the security interest that we talked about at some length here.

THE COURT: I don't like to beat this to death, but I spoke to you earlier, but I wrote you in July and you wrote

back about my concern that the Copyright Act precludes associational standing, and I got back a letter from you, but in each time that we talk about -- and, again, it's probably my fault because of my naivety about copyright law -- but each time that you responded with arguments they did about Hunt and the Constitution, but that really wasn't my question.

My question really is do they have standing or do associations have standing under the copyright law in the first place, because that would get rid of my whole lawsuit here, and I could go on to other things. Well --

MR. ROSENTHAL: It wouldn't get rid of your whole lawsuit.

THE COURT: No, I said it qualifying.

MR. ROSENTHAL: There would be lots of plaintiffs and also associational plaintiffs.

THE COURT: 116.

MR. ROSENTHAL: That own works themselves.

But, yes, your Honor, they do have standing, constitutionally and otherwise, because the question of whether or not a third prong of the Hunt Test as to whether the individual author has itself have to have a right is prudential, it's something the Court can decide in the interest of equity and of judicial efficiency whether or not it makes sense to have those rights adjudicated in one place.

THE COURT: Judicial efficiency would get rid of it.

MR. ROSENTHAL: The reasons that we wrote the letters to you, your Honor, the whole reason -- and I may be saying something the Court knows -- the reason we wrote the letters was because between the time we filed our motion for judgment on the pleadings, or defendants moved for judgment on the pleadings and we opposed on the associational standing ground, and there were three briefs in that matter, Judge Chin in *Google Books* case faced with the same issue decided that the associational plaintiffs did have standing to go forward in spite of the fact --

THE COURT: That was a little different.

MR. ROSENTHAL: It's different in the sense it's a class action rather than individual actions, but he went out of his way to say that because defendants had not bothered to look before they copied everything, that it wouldn't be fair to now make every single association come in and prove that every single member owned his work at this stage of the case.

Your Honor, I submit that if there is a finding for plaintiffs in this case, we can have a mechanism, as there was in the *Itar-Tass* case the Second Circuit wrote about or the *Napster* case. There could be a mechanism by which, if there are really challenges to the ownership by the associations to those works, we can address them at the remedy phase. Most of them are foreign owners where there is no U.S. copyright required, but we can come in and show exactly which works are

owned and they can say whether they are or aren't in the HathiTrust database. We don't have to do this stage and deprive all these authors of the right for their day in court because judicial efficiency would be very hard for all of them to come in and start bringing claims.

THE COURT: That's one type of judicial efficiency.

MR. ROSENTHAL: Well, right.

Finally, I just want to talk about marketing works for one moment because it tends to get forgotten and defendants in their briefing have put it at the very end of their brief, and basically said if you are really going to address that we should have more briefing, which is really astonishing given the fact I think we filed six briefs already in this case.

Orphan works -- there is simply no justification for defendant's orphan work program. They came up with a system where they identified works where they said we can't find the owners, and if no owner comes forward in 90 days, we're going to make them available for viewing and downloading in certain circumstances. We filed this lawsuit in that immediate time frame, at least two of the plaintiffs works were found to be orphan works. People came out of the woodwork and said, wait a minute. Those aren't orphans. In one of your declarations, the head of the Author Guild explained that he was able to find the owner of one of the orphan works with a Google search in a matter of minutes.

Now defendants have said we've suspended the orphan works program, therefore, you can't adjudicate it here. Despite numerous opportunities, they've never said they ended it. They simply said we're not going to do it now. We're figuring out how to re-figure it and we'll do it later.

The orphan works program essentially is taking copyrighted works, making them fully available without permission, without compensation, without accountability to copyright owners. Congress has had orphan work legislation before it and hasn't acted yet. That doesn't give the defendants the right to simply decide it is time to take the law in their own hands and decide, OK, Congress won't do it, we're going to do it ourselves. So the orphan works program, leaving aside everything else in this case, is a clear copyright infringement.

THE COURT: Thank you.

I will be glad to hear from your adversary, if one or more of them have something to say.

MR. PETERSEN: Thank you, your Honor. I know there are a lot of facts for your Honor, but I think the easiest fact in terms of resolution of the motions is really this, this core fact, your Honor: You cannot read plaintiffs books through the HathiTrust Digital Library unless you are print disabled. The HathiTrust Digital Library does not distribute plaintiffs works, it does not display plaintiffs works, but scholars can

use the HathiTrust Digital Library to find books but not to read them, for purposes of scholarship and to paraphrase Wordsworth "to voyage the seas of thought."

What is the HathiTrust? Your Honor, the HathiTrust is a collection of books in digital format that are put to very discrete, very limited uses. And there are three, your Honor: There's search; there's providing access to the print disabled, which my colleague, Mr. Goldstein, will talk about in more detail; and there's preservation.

Now, we submitted a declaration from a remarkable scholar named Dr. Stanley Katz of Princeton. There is a lot remarkable about Dr. Katz, but one of the most remarkable things through our declarations, he talks about the evolution of library search starting back in the early 1950s when he was an undergraduate and how that process worked and continuing right through the current day. He talks about the transformative changes in scholarship that are wrought by full text digital searching. He talks about in the Fifties that when he wanted to find a book, he had to go -- we all remember books from university -- had to go to that card catalog system, flip through it with very limited information -- information such as author, and subject matter and publisher, and so if some piece of information you were looking for was in the book, but it wasn't captured in that card --

THE COURT: Are you saying, Mr. Petersen, the fact

that it isn't there in toto, the books, but rather these are sort of like indexes that makes the copyright law unusable in this case?

MR. PETERSEN: I'm saying it's a transformative purpose, your Honor. My clients have not copied books for purposes of allowing people to come in and read it. That would be copyright infringement. I think in that case plaintiffs would be right in they're saying that's theft. But that is not this case, your Honor. It's a use to help people discover books, but not to read them.

THE COURT: What about his position that you didn't ask anybody for permission, including authors, and you went right ahead and copied maybe we can argue what copy means, 7 million books?

MR. PETERSEN: That's the nature of Fair Use, your Honor.

THE COURT: That's Fair Use.

MR. PETERSEN: That is Fair Use, your Honor. I would just like to address, since your Honor brought it up, this concept of, well, you can't copy lots and lots of books, and if you do, that is not entitled to Fair Use. As your Honor picked up earlier, *Kelly Arriba Soft* dealt with millions of works that were copied in connection with that search index in *Kelly Arriba Soft*. The *iParadigms* case in the Fourth Circuit dealt with a hundred thousand student papers uploaded to that server

per day. In fact, there was a very interesting point made in the Court of Claims back in the Seventies about the number of works that are copied in Fair Use. The Court said, and I'll quote: "In view of the large numbers of scientific personnel served in great size of the libraries, the amount of copying does not seem to us to have been excessive or disproportionate. The important factor is not the absolute amount." And it goes on. That's *Williams & Wilkins v. U.S.* 487 F. 2d 1345.

So Fair Use is not a game of numbers, your Honor. If I take one copy of one word of some best seller and I scan it and put it on the internet, that's infringement.

If I take, as the libraries have done, the entire corpus of works and put them to very limited uses, that's Fair Use. There's no harm to a market, as I'll go into detail in a moment. It's transformative purpose. It's Fair Use, your Honor.

Your Honor, with the Court's indulgence -- and plaintiff's counsel alluded to it -- I would like to show a demonstration, if your Honor would find it helpful just to put this service in context if that would be OK.

THE COURT: I can't tell if I will find it helpful yet, but I'll be glad to watch.

MR. PETERSEN: Thank you, your Honor.

Just to start before we actually could play just to set this up. Imagine, your Honor, you're a student at the

University of Michigan's pharmacology department, and you want to learn about medicines that could cause anaphylactic shock. Anaphylactic shock is a extreme allergic reaction that in certain circumstances could cause death. So if you're that student and you have a term paper due and you're talking about drug interactions that could cause an individual to go into anaphylactic shock, under the old way of searching, searching the bibliographic information author, subject matter, you could run a search that would look a bit like this.

What this is showing on a HathiTrust word site, there are two tabs, there's a catalog search tab which is a way to search that runs before the HathiTrust full text searching mechanism. And if you enter anaphylactic shock -- this is in our papers of John Wilkins' declaration -- there are screen shots of this. We are going to show you how it actually works essentially in realtime. Those are the fields that you're limited to in a catalog search. Go back up, you search all fields and you hit search, and you return three books. Those are the books that have anaphylactic shock essentially in the subject matter.

Now, in contrast, a search over the actual corpus, the full text of these works, enter the same search term in full text search, anaphylactic shock, it finds, as you can see, far more works. You can then do refined searches and it actually will narrow it down, but it shows you the body of scholarship

that would be available to that student of Michigan in the pharmacology department if they wanted to learn about anaphylactic shock.

Now, focusing on this particular book, it happens to be in copyright. You can see full view is not available. There is no way for that student to read that work online. It's not available to be read.

If the student wanted to find that book, I'm going to show you in a moment how the student would do it. Go in, do a world Cat search, find the nearest library close to us, and there they are, it's at SUNY's Health Science Center in Brooklyn. If you want a copy of that work, the student has to go and check out that work. If it's available and it's in print, and you can find it through Amazon, they could buy that work. It's a new service with tremendous power and potential. But the way to actually get the book is the same way it always worked: You need to go to your library or you need to buy the book. It's the fundamental reason why when plaintiffs talk about theft and stolen, that they're fundamentally wrong.

The interesting thing is plaintiffs in response to all the proofs that we put in, they said, I think, they said we applaud the value to the HathiTrust. We share authors after all, we share the values of the HathiTrust, but this is our property, and we have the right to say no one can use it without our permission. It is essentially -- and in fact, a

board member of plaintiff's Authors Guild goes so far -- plaintiffs quote this in their papers. Not only did he say it during a deposition, but they've actually highlighted it in their reply papers. He said, it's my baseball, and you can't take my baseball. It's my baseball.

Your Honor, copyright does not arise from natural law conceptions of property ownership. That is never the way copyright law has worked. It's a creature of statute with a carefully calibrated mission to promote the progress of science.

As the Court explained in the *Sony Betamax* case, "The monopoly privileges that Congress may authorize were neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public policy may be achieved."

Now, your Honor, we briefed extensively the four Fair Use factors. Your Honor is aware that in this circuit, as most circuits, factor one is the most critical factor, the purpose and character of the use. Here it is overwhelmingly significant that my clients are non-profit actors, and the purposes behind this service are for scholarship, teaching and research preamble uses that are called out in Section 107 as tilting strongly in favor of finding for the plaintiffs on the all important factor one. There really can be no question that what the libraries are doing is transformative, your Honor, and

your Honor is exactly right to bring up *Arriba Soft* and talk about in that case the Ninth Circuit found that "approving access to information on the internet versus artistic expression is a different type of purpose." When we talk about purpose and character and transformative use, what we're talking about does the new use supersede the old or does it add something new.

Judge Posner, I think, put it in the *Ty* case extremely aptly, what we're talking about does the new use substitute for the old --

THE COURT: Mr. Rosenthal believes that the distinction that in these cases it was already on the internet is determinative so that the transformative element really is not satisfied.

MR. PETERSEN: But there is no reason for believing that, your Honor.

THE COURT: Well, I am trying to get your thoughts on that.

MR. PETERSEN: I understand, and I'm sorry, your Honor, I will get there. It is essentially -- the most fundamental point is these were published works. So the fact that they were published on the internet in *Perfect 10* and *Kelly v. Arriba Soft* versus here published and in the library's collection, they purchased these books. That's the fundamental thing. These aren't unpublished works. They concede that

these are all published works.

Ordinarily when we deal with the internet, case law from kind of pre-internet age is applied to the internet. Courts look at it and say there is no reason to treat it any differently because it's on the internet. Here, it is somewhat slightly more unusual that you have these cases that came out on the internet, but there really is no reason they wouldn't apply physically. It just so happened that we had these cases come out first about the internet and then we have this technology that allows us to digitize published works the physical works.

THE COURT: I didn't mean to interrupt you if I did.

MR. PETERSEN: Absolutely fine, your Honor.

Also, want to talk a little bit about market harm. The fourth Fair Use factor, the market harm factor, examines the effect of the use on the potential market for value of copyrighted work.

Plaintiffs concede that there is no licensing market for digitization of library collections for the purposes set out in the HathiTrist. We asked them very detailed interrogatories about how they're harmed by the service. What they told us was they could not identify "any specific quantifiable past harm or any documents relating to any such past harm of any kind. They couldn't identify any revenues or other earnings of any kind generated or expected to be

generated in whole or in part for archiving research, full text search or use by the blind."

So the question becomes is a market likely to develop. For that we retain the services of a renowned economy, Joel Waldfogel. Dr. Waldfogel examined the market in detail. He looked at what the cost would be under a licensed model. If a player came in and said we want to run a business about this. We're going to get these rights. We're going to have this digitized corpus and we're going to license entities like the libraries. What he determined is just the digitization alone being $569 million. That's not even addressing all the transaction costs that would entail actually licensing these works and all the license fees.

Then he compared the types of licensing revenue that such an actor could actually receive from libraries, parties that were not interested in licensing the work for purposes of providing access to the work themselves, but simply to allow searches to be done and simply to preserve those works and simply to enable the print disabled to receive those works.

THE COURT: One of the things that Mr. Rosenthal mentioned -- not exactly, but close -- is concern about the digital, digital sayings creating some new security risks for all of the digital works. What is your view on that issue?

MR. PETERSEN: Your Honor, the libraries very deeply share that concern. I think any organization that guards

information on the internet such as banking, so much now is done where people can access information. I can sit home in my house on the weekend and tap into our work database. It has all this confidential information. There are tremendous amounts of expertise developed to protect that sort of information -- banking, to allow me to tap into my firm's network remotely, to protect things as the HathiTrust library.

The interesting thing about plaintiff's submission on the point of security is that plaintiffs have submitted testimony from an economist that says, oh, this could be hacked. That's essentially it. He was actually examined in the Google case, and they said is this your expertise, and you examined Michigan security protocols, and he admitted he wasn't really that familiar with Michigan security protocols. Then he also said something that I find remarkable from a witness submitted on summary judgment. He said, I wouldn't be the person to do that, but I could find you someone who could.

So we in response to that submitted a detailed declaration from Cory Snavely from the University of Michigan. He has firsthand knowledge of the all of the security protocols. He talks in detail all of the steps that are taken to protect the security of the corpus, all the firewalls, all the login identifications, all the login information that's created. And the proof is in the pudding, your Honor, because there has never been a breach. There's no evidence there has

been a breach that has allowed any unauthorized individual to access any copyrighted material. That's the most fundamental point.

The HathiTrust has been certified by a reliable repository, by the Center for Research Libraries. So, it's certified, we spend a tremendous amount of effort protecting it, and it's really no different than other databases that are kept confidential and privileged.

That doesn't mean hackers aren't out there. Just like banks do, just like my employer does, just like it's done day in and day out in this country in the global economy, steps are done taken to protect these databases that are vital and crucial to our ability to compete in the global marketplaces to have these services, to leverage the benefits of them, and to attempt to mitigate the risk --

THE COURT: It's balancing issue, and you come out on your side.

MR. PETERSEN: Very much so, your Honor.

THE COURT: Another point that was raised both at oral argument here today and I guess in the briefs, essentially your adversary -- I'm not sure how it plays out actually, but I thought I would get your view, essentially the plaintiff is saying that you're saying that it was OK for the libraries to purloin all these works because they couldn't afford to buy them. You heard him say how expensive it would be if they were

to go out and you were to go out and try and buy them. I am not sure how that cuts. But what is your thought about it in any event?

MR. PETERSEN: Your Honor, I think it is an interesting rhetorical device. Really what we are talking about, and we submitted a declaration from the economist, talking about the market is very pointed evidence going to is a market likely to develop. On that issue, it's entirely appropriate to have someone look at the costs. If no market is ever going to develop, well then there's no fourth factor harm.

So it's going to a very particular issue that's relevant to the Fair Use analysis, which is if this was not Fair Use, wouldn't a couple years where we have some organization.

Your Honor, we also deposed a representative of Copyright Clearance Center and asked Copyright Clearance Center about their plans to exploit these types of markets. For example, the questioning was put to that witness, is there anything in the 2011 to 2013, three year strategic plan regarding CCC licensing the use of digitized versions of textual works in connection with full text searching. And while the CCC designated that transcript confidential, and so I can't say it in open court, it absolutely does, your Honor, it's in our papers, it does undercut entirely the notion that some market is going to develop.

The other interesting thing I hear plaintiffs saying in their papers, although it wasn't really said today, was this notion of don't rule, your Honor, in favor of Fair Use, even when the factors point in that direction. Give Congress a chance to look at this. Those are the exact same arguments that were made in the *Sony Betamax* case in the early Eighties. This is what they urged the trial court and all the courts, and the trial court and Supreme Court both disagreed this is new technology. It's new. We need time to analyze it. It's policy. Let Congress do it.

Both the trial court and the Supreme Court in *Sony* said no, that's not what judges do. I apply current law, and the fact that it's a new technology and the fact that Congress may or may not act, that's not relevant. What is relevant is let me look at Section 107. Let me apply the Fair Use factors and let me see which direction they point. The court did that, and now 30 some odd years after *Sony Betamax* Congress still has not acted about this new technology of VCRs, your Honor.

I also want to briefly address an argument that I heard plaintiff's counsel make about we care about providing access to the blind and print disabled. The thing about that is I examined, I deposed the secretary of the Authors Guild, Pat Cummins. I also deposed another one of the plaintiffs, Mr. Ronning. And I put those questions directly to them. I asked Ms. Cummins: So you do not believe the print disabled

should have access to these works? Her answer was a flat no. I asked Mr. Ronning: You have no understanding of how a U.S. student with a print disability would obtain access to your works. His answer: No. Why should I?

So, maybe plaintiff's counsel shares this goal providing access to print disabled, but my examination of these witnesses tell me that the actual authors themselves do not, unfortunately.

I want to say just a little bit, your Honor, about the orphan works project. It's a project that never went forward to the second phase. There were two phases to it. One is to do research to identify potential orphans, but then as the project was announced, we extremely limited distribution on a one-to-one basis so for as many copies as that library had, it would be distributed once an orphan was identified in public comment, the project never went past public comment phase. They stopped it. John Wilkins gave declaration testimony saying, we do not know whether or how the NWP will continue. There has never been a distribution of a work pursuant to the OWP. So we believe it's not ripe for adjudication, and there has been no infringement of a 106 right. So, if any party is entitled willed to summary judgment, it's the libraries on that issue.

If your Honor is to entertain and take the facts as the libraries stated as to how that project would have worked

back when it was contemplated to go forward, our papers lay out why those uses are in fact protected by Fair Use and actually are protected under 108 as well.

Your Honor, plaintiffs ask this Court for equitable relief, but the equities are not in their favor. It has been years now, six, seven years since the digitization was announced --

THE COURT: You think all these authors are supposed be to be essentially without their copyright, that doesn't give them any equitable role in this decision that I have to make?

MR. PETERSEN: Well, they certainly is a legal claim.

THE COURT: Forgetting the legal claim.

MR. PETERSEN: But that's what I want to address, your Honor, because the equities are this: All this time for all these years, the libraries have been building this database of works making limited uses and investing in protecting these works. It was only a year ago that the authors saw fit to sue the libraries. So all that time of building this database and working, the libraries did nothing. Now they ask for --

THE COURT: Isn't this a little sort of sea change in one the libraries are doing as opposed to what they have been doing when these copyrights were issued years and years and years ago? You don't think your demonstration is something that is relatively new? I think you just got finished telling me how new that was.

MR. PETERSEN: That service went live in '08, your Honor.

THE COURT: Yes, and that's relatively new in my book, but I'm older than you are, I guess.

MR. PETERSEN: Well, your Honor, essentially they seek this extraordinary relief of impounding and appraising all these works, all of these marvelous works that gave birth to all these wonderful scholarships to be put to new uses like text mining, as we talk about in Dr. Smalheiser's (ph) declaration. Their premise for doing so as, Mr. Styles (ph) said, it's their baseball, but copyright is never treated, the holders of copyrights as the owner of a baseball. Copyright has always sought to achieve to allow people to use works that ultimately is benefiting the public, not harming authors, and serving the progress of science.

Your Honor, that is exactly what we have here. We are benefiting the progress of science and are not harming authors and using these works in new transformative ways. We respectfully urge that your Honor grant our summary judgment motion.

THE COURT: Let me hear a few words from Mr. Goldstein.

MR. GOLDSTEIN: Thank you, your Honor. Good afternoon.

THE COURT: Good afternoon.

MR. GOLDSTEIN: The blind don't have a plan B, sir. The only way for blind scholars to have equal access to the content of research libraries, the only way for blind scholars to have the same opportunities as their sighted peers to conduct research is to do exactly what the HathiTrust has done here; that is, not only to digitize university collections --

THE COURT: How is it as we heard a moment ago that so few people are interested in this phenomenal opportunity?

MR. GOLDSTEIN: It's not so few people are interested, your Honor. It is that so far the only school -- the University of Michigan is the only school in the HathiTrust that has taken the steps that were we're talking about here.

THE COURT: But even there, even in the University of Michigan.

MR. GOLDSTEIN: It is a relatively new phenomenon still, and --

THE COURT: So is the Ford but everybody knew about it.

MR. GOLDSTEIN: Perhaps, your Honor, but the blind have no less curiosity or desire to succeeded academically than anybody else, and this tool is a powerful tool. So I don't know where the 32 number comes from.

I do know though that even if the incidents of blindness goes down greatly and so we have smaller numbers, it is not at the end of the day a question of how many blind

people there are in the general population but what are the opportunities we give to those who are blind.

The HathiTrust has done more than just digitize its collection. It's done so in a way that a blind person's software can either localize the content or can see it on a Braille display. The significance of that I think can be well stated from recognizing, it's thought of as an ordinary thing, I suppose, that for well over a century every day at the Universities of Michigan, California, Wisconsin or any of the other HathiTrust schools, freshman, graduate students, professors with endowed shares and all manner of other scholars, walk into their school libraries and can mine the best reserve of knowledge and maybe even wisdom contained in those libraries. There were two reason they can do that. One is that they are members of those communities. And the other is that they're sighted. And good comes out of those activities every day.

Sight was required and had always necessarily been so until now, but now these universities have made digital scans of this collective and collective knowledge, and not just any scans, but scans the blind can read.

Can there be any questions whether the numbers 32 or 15 or 5,000, but that the good that comes out of the research and scholarship will be multiplied by adding others to that daily occurrence, adding the blind and the many others with

print disabilities to those who already engage in that activity.

Now that it is possible for blind scholars to have this opportunity, we would submit that they also have the right, and that is where Mr. Rosenthal and I seem to part company. I am glad that there are authors whose intentions are good, but the time has long past that we have to be dependent on the kindness of strangers. This is a matter of rights. The right stems from societal commitment to equal access, one that it has found its voice in numerous enactments in Congress; not just the Americans With Disabilities Act that you mentioned earlier, the Rehabilitation Act of 1976, and in the Doctrine of Fair Use, because that has always granted the right to make socially beneficial uses of copyright works without permission and the Chafee unit.

As its preamble proclaims, the ADA is intended as a clear and comprehensive national mandate for the elimination of discrimination against people with disabilities. Thus, the arc of the law is towards facilitating our shared goal of eradicating, where possible, spurious discrimination.

And with respect to copyright law, I would suggest, your Honor, it's pertinent to remember what the Second Circuit has told us in the *Bill Graham Archives* case where they said, and I quote, "The ultimate test of Fair Use is whether the copyright laws goal promoting the progress of science would be

better served by allowing the use than by preventing it."

When Mr. Rosenthal rises in rebuttal, he must acknowledge that the goal of promoting the progress of science would be better served by affording the blind the opportunity to engage in research on an equal footing with their sighted peers.

Only very rarely, your Honor, do occasions arise to transform one of our national ideals from intention to reality. This case is such a rare occasion. The Authors Guild has said to you that this case is not about cutting off use to the blind. From the perspective of the blind, this case is about nothing but. He says that it is not their intention to cut off use for the blind, but what they ask for is to cut off use for the blind.

When you asked what was plan B, what would be the other way of doing this, he espoused the notion of getting releases from more than 7 million rights holders. You have the 70 percent he says that are in copyright, but then you've got books that have illustrations and other pages that are owned by a different copyright owner. So getting releases from more than 7 million rights owners, many of whom are unknown, whose works are now orphans. And I don't know, given the cost, how he proposes this would be done. The blind didn't have a problem paying my $350 pro hac vice fee, but $569 million to do the digitizing after getting the rights releases is a bit of a

steep price.

THE COURT: And the Bench and Bar Fund wants to thank you for the $350.

MR. GOLDSTEIN: Thank you, your Honor. I didn't think that should go unmentioned.

So the Authors Guild are trying to interpose themself between the blind and the contents of the library which would prevent the ideal from being realized. What's disturbing about this, Judge, is that doing so will not work any benefits for the Authors Guild, even though letting in the blind would work no harm on the Authors Guild. What do the plaintiffs get from denying access to the blind?

This is a critical factor in two ways: One is the obvious issue of market harm under Fair Use. Another is that their motion did not address the question of equitable relief, but we know the first requirement of equitable relief, and that is that you must show an irreparable injury, one that will happen or has happened, and they can't show that they're entitled to equitable relief because they have never shown that they are injured.

In fact, the record is to the contrary. We asked interrogatories of the Authors Guild, and two of the answers I'd like to read you in part because they simply take care of the issue forever. We asked them about their revenues from sales to the blind of digital copies. And they said

"Plaintiffs respond that by tradition and industry practice, authors generally do not receive royalties for the licensing and sale of works distributed in specialized formats exclusively for use by the blind or others with disabilities. Accordingly, for the purpose of this litigation, plaintiffs are not claiming that any revenues or other earnings of any kind were generated or are expected to be generated, in whole or in part, by the reproduction or distribution by defendants," meaning the HathiTrust "of copies of plaintiffs works for use by the blind or other visually disabled persons."

In other words, they have just said, we won't lose one penny of revenue because the HathiTrust is making these books available to the blind.

We also asked them about the market for these books, and they said they have not identified any specific quantifiable past harm or any document relating to any such past harm suffered as a result of the actions of defendants in making books in fully accessible formats available for libraries lending to persons who cannot access print versions of such books. Or taking out lawyer-ese and putting in human being language, they said what the HathiTrust is doing for the blind hasn't hurt us economically, and we have no expectation that it will.

Mr. Rosenthal mentioned the question of security and the risk of security. I would like to address that briefly.

The Authors Guild is not suggesting that if the digital copies are gotten rid of, that the libraries also get rid of their print books. How hard is it if they got the relief that they asked for? How hard would it be for a pirate to pirate a book from the University of Michigan library? Well, you'd need a Xerox machine. Not hard to do at all.

Or if you wanted to put it on the internet, what would you have to do? You'd have to ask that Kinkos or Fed Ex do they also have a flat bed scanner? They would say yes. You would scan the book in, and then you would put it up on the internet. Indeed, every time a best seller like Harry Potter goes out in print, pirate copies go out on the internet. So if you get rid of the HathiTrust, you do nothing in that regard.

Now, the value that lies in the HathiTrust is in the searching that Mr. Petersen has referred to and the data mining and the access to the blind, but these are things for which there is no market.

I also point out, the only record about piracy here is what we made with the declaration of Mr. Fruchterman. Mr. Fruchterman runs Book Share, which is Chafee authorized entity. Unlike the libraries here, which has what I would call boring books, the Book Share houses the hot books, the best sellers, and Mr. Fruchterman doesn't use any security other than what's called a fingerprint. That is, if somebody makes a copy, somebody from the blind or other print disability makes

an unauthorized copy, it shows up with that fingerprint and you can go back to the person who made the unauthorized copy and take appropriate action. What he said was, it's turned out over years of experience that piracy is rare -- excuse me -- unauthorized copying is rare and none of it was done with the intention of piracy.

THE COURT: Tell me something that may really not have a great deal of relevancy, but with respect to the Chafee amendment that you've now mentioned a couple of times, are all libraries authorized entities under the Chafee amendment? I gather plaintiff does not think so.

MR. GOLDSTEIN: They are not. They have to become one, and that involves a couple of things: To become an authorized entity, first of all, you have to be either a governmental entity or a non-profit. I should explain an authorized entity doesn't mean there's some third party out there that says bless you, my son, you are now an authorized entity. There is no external designated agency. You have to make a non-profit or governmental entity.

Then what you have to do is to have as a primary mission the reproduction and distribution of books in specialized formats exclusively for use by the blind. I didn't see the primary mission. It's a primary mission. All of these universities operating through the HathiTrust are susceptible to being -- the significance of the Chafee to this case is not

just to distribution of University of Michigan students. If Chafee applies, the University of Michigan can, as I understand it, will make these books available to the blind of the United States as required in the -- in the manner required by Chafee, which is you have to have through a competent authority certified proof that you are blind or otherwise print disabled, which is what they are already doing at University of Michigan. You go to the disability student services office, you present your ophthalmologist's certificate or your neurologist's certificate, whatever the nature of your print disability, and you have to be certified and register. Then you have access to the books.

So, can these entities be unauthorized entities if they choose to be? The answer is absolutely. Because they meet all of the qualifications. If there is one fact here that makes this totally susceptible to resolution on summary judgment, it is this: The Rule 56.1 statement that was done by the universities extensively describe how the -- it was the intention from the beginning to make these books available and accessible to the blind. They did not contest the statement that the HDL was designed specifically to enable libraries to make their collections accessible in digital format to print disabled readers. They didn't contest also that one of the primary goals, one of the primary goals of the HathiTrust has always been to enable people who have print disabilities to

access the wealth of information within library collections. With those two statements undisputed, it is imponderable to me how the argument can be made that these entities aren't qualified authorized entities.

If I could return, I wanted to make a final point on this no harm issue. I think the precedent for where the Authors Guild is in this case is the one found Aesop's fable of the dog and the manger. The dog kept the hay away from the horse, even though the dog could not eat the hay. This is very much what it seems to me that the Guild is doing here because in denying access to the blind, they will reap nothing.

On Fair Use, Mr. Petersen talked to you in great detail about that, so I just want to make a few points I think are very important. One is that making accessible digital scans for the blind is transformative. The Authors Guild actually hasn't argued otherwise in its pleadings, and it's presented no evidence to the contrary. And they couldn't. Reading a print book is a visual experience, so it's beyond the ken of those who can't see. So if you make a print book, one that a blind person can read, you transform it. And the conversion from print to digital is simply a means to a new use, a new purpose that couldn't be accomplished in its original format.

Dr. Maurer put it well in his declaration where he said blind students compete under a severe handicap, not for

lack of sight, but to lack of accessed information in a world in which information is the key to success.

You asked a question, or you mentioned after Mr. Rosenthal talked about how this was all done without permission, and I would note that Fair Use doesn't require permission, but you asked a question about that. The Second Circuit has said -- and I don't think there is a question of bad faith here -- but even when there is, the bad faith of a defendant is not dispositive of Fair Use defense. That was in the *NXIVM Corporation v. Ross Institute* case where there was no question but that there, unlike the libraries, the copies were purloined. They took copies they didn't have a right to take, unlike the libraries books, and the Court still upheld Fair Use.

On the volume of copying, Mr. Rosenthal's theme when he stood up, the volume of copying required to give the blind equal access to the library is what's in the library. The needs of a blind scholar are coextensive with those of a sighted scholar, and what's appropriate to be in the research libraries collection for the sighed is appropriate for the blind scholar as well.

I'm reminded of a store of a constituent asking Abraham Lincoln how long his legs were, and he said "long enough to reach the ground." That's how comprehensive this copying is, as much as necessary.

I have already addressed the market harm issue. There is none here. I would just note that we heard from Mr. Rosenthal again this notion that it's the right of the copyright holder to decide when and whether to make a copyrighted material available to somebody. We have had this notion before of absolute rights when it came to private property. The first time I heard it was 50 or 60 years ago in the context of "I have the right to refuse service in my establishment to whomsoever I choose."

And our collective response was legislation that said, no, the rights of private property must be exercised in the context of our greater society and its requirements.

Well, long before that, Fair Use set that same balance that the rights of public interest are balanced against the rights of the copyright holder. And Fair Use is just such a limitation. Here it allows the blind access to materials because that vindicates a public interest, an interest that even the Authors Guild admits exists, and, again, does no harm to the copyright holder.

I'd like to turn a little bit to Chafee. Mr. Rosenthal said in his briefs that Chafee are all the rights that a blind person gets. There is no Fair Use for blind persons. I submit to your Honor that it was not the intention of Senator Chafee and his fellow legislators to create a ghetto in which the blind must remain untouched by the volume of Fair

Use, but rather to create an opportunity for the blind.

Mr. Rosenthal says that the blind therefore may never have Fair Use access to dramatic literary works since those aren't covered by the Chafee amendment. Well, certainly I guess it's a risk since maybe a blind Greek might be inspired by dramatic literary works the tales of Ulysses, Penelope and Telemachus. Where would we be then?

I can only paraphrase Jerry Ford and say that if John Chafee were alive today, he would be rolling over in his grave at the Authors Guild's characterization of his amendment. It was Senator Chafee who said the amendment was to help end the unintended censorship of the blind. There is not one jot or tittle in the record to support the mean-spirited notion that Congress wanted to cut off the blind from Fair Use.

It's not the first time the arguments has been made. We've all heard about how 108 means no Fair Use, but it's failed before in CN Enterprises, the argument was that 117 meant that 107 didn't apply, and the court said that bordered on the frivolous, and it does.

I've talked a little about use the University of Michigan and the HathiTrust schools operating through the HathiTrust can be Chafee entities. Let me also address this question that they raise about that these are not specialized formats.

The referenced to specialized formats for exclusive

use by the blind does not mean a format that only the blind can use. To conflate them, as the Authors Guild suggests, would mean that authorized audio books would have to be a frequency only the blind people can hear.

THE COURT: Mr. Goldstein, I think your adversary really does deserve some time, and there are only ten minutes left on my clock, so I think we ought to give him an opportunity, as much as I enjoy listening to your argument.

MR. GOLDSTEIN: I'm sorry, your Honor. May I have 30 seconds to conclude?

THE COURT: Sure.

MR. GOLDSTEIN: I would just point out that Mr. Akin in his second declaration acknowledges that in the settlement agreement with Google that what the law requires from Chafee was being followed in that settlement agreement, and that is what the University of Michigan is doing today.

When something new comes along, your Honor -- and what the HathiTrust has done is undisputedly new -- part of the challenge for a court is to harmonize new developments with the existing fabric of rights and obligations, and when possible reach a coherent and sensible result that is consistent with the applicable statutes, case law language, reason and common sense. We submit that what is sought here is what does so, and we ask that summary judgment be entered in our favor. Thank you.

THE COURT: You have ten minutes for all your rebuttal and hopefully you won't need it all.

MR. ROSENTHAL: I don't think I will need it all, your Honor.

Mr. Petersen talked about the *Sony* case. And the fact that *Sony* basically made a decision about copyright law in terms of VCRs. *Sony* case was a case where Congress had not spoken on the issue. Supreme Court explicitly said that in its decision that that was a case where you had new technology and you did not have congressional resolution of it. It said normally Congress sits down -- just like we're saying happens in this case -- sits down and has the various stakeholders come up and describe their interests, and Congress comes up with something. *Sony* had nothing at that point and Supreme Court had to decide whether time shifting was in fact a Fair Use.

Here the situation couldn't be more different. Here Congress has spoken. Congress, after 40 or 50 years of consideration and amendment, has Sections 108 that governs when libraries archives can and can't make copies. A very, very different situation. It also makes the situation very different from the *Arriba* and other Ninth Circuit search engine cases because those are cases where Congress hasn't spoken. Congress hasn't talked about whether it is or isn't permissible for a search engine to make copies of image files and thumbnail form to aid in searching on the internet. Congress has decided

that libraries cannot make multiple copies, multiple digital or other copies of works without going through certain steps. The same with Section 121 where, whatever the spirit might be of senator Chafee, Section 121 sets forth which entities are allowed to make copies for visually disabled and what formats they may be in.

Your Honor, there has been a lot of talk that somehow the Authors Guild being painted as this horrible anti-blind organization, and even I think rather offensive quotes from a couple of witnesses, Pat Cummins who is a children's book author, it's easy for a good lawyer like Mr. Petersen some have her say something she doesn't quite understand. Mr. Ronning is a Norwegian. None of those people were expressing disinterest in the rights of the visually disabled. That is just not the case.

This is not a case where there is a question that a particular work might be made available to a particularly visually disabled student in need. This is a case where many copies were made where copies were given to Google, where the copies view full text and image files remained on servers irrespective of any particular need or use by any particular visually disabled students. As I said earlier, in a remedy phase of this case, the parties can sit down and figure out a way where visually disabled users can have access to digital copies of works when needed because I understand the current

situation where it's difficult to have them because of the time it takes to get a copy of a particular work makes it difficult. But that doesn't justify making millions of copies just because somebody might someday need one.

That is a perfectly appropriate situation, just as in the Google book settlement, the parties sat down. The Authors Guild was a party to that, the University of Michigan was a party to discussion in the Google book settlement, and the National Federation for the Blind spoke out in favor of the Google settlement, which included mechanisms for making books available to visually disabled and accountability for those uses.

This is not a situation where we are trying to make it impossible for the visually disabled ever to have access to a book, but it is a situation where they can't justify the acts of the infringer just because there are users who may benefit from the infringing conduct.

A couple of other quick points, your Honor. As for the estoppel argument, which I can't recall which defense counsel made, and somehow this has been going on for years, your Honor, there were settlement discussions in the Google Books case until March of 2011 when the settlement was rejected. Just A couple of months later, the HathiTrust University of Michigan announced the Google Books project, and decided it was going to go ahead and make books available for

full -- for display and view and possible download in spite of the rights of copyright owners. That's when this lawsuit started. Nobody was sitting on their rights for years. There was a resolution in the works that just didn't happen.

Then I also wanted to point out that as opposed to the arguments made by defendants and intervenors, there are markets developing for use of digital copies and plaintiff's expert Dan Nocera, spoke about them at length when he talked about clearing houses, when he talked about the developments in foreign countries of rights organizations that exist to allow users like libraries to have the right to make digital copies and use them under appropriate agreements with compensation and with appropriate security and with accountability.

Finally on *Arriba Soft*, nobody goes to a web site to buy the web site. It's very, very different. People go to books, if people get books in order to read them and books are purchased. Nobody purchases a web site. It's very, very different in the situation when the Ninth Circuit in those cases where a search engine points a user to a web site and then the user can go look at that web site to a situation where somebody is finding a book that it might otherwise purchase.

So, your Honor, I don't think that those cases are applicable here. It is a very, very different situation. And as far as the argument that anybody can go into a library and make a Xerox copy of a book and put it on the internet. That's

true, anybody can do that. That's the same argument with music and the same argument with other kinds of art forms. There is a very big difference between a person making a digital copy and posting it on the internet with somebody having access to millions of copies all at once where all of a sudden the entire HathiTrust Digital Library is on some server in some country where this court or no court in the United States may have jurisdiction and suddenly people are able to see the fruits of our plaintiffs and other authors labors for free to copy, to download, to print and to read, taking money out of the mouths of our clients. It's a very different situation.

One-off copying is always going to be a problem. It is a problem for authors and publishers, chasing pirates and infringers. Just like in the music world it's problem for the music copyright owners to chase down people who put works on peer-to-peer share files, and in those cases the courts have enjoined the existence of the peer-to-peer files because they, among other things, allow this mass potential piracy.

I think if there are no further questions, I will stop speaking.

THE COURT: Well, I have some questions, but I am going to try and work them out after all the learning that you all have left me with, and read the transcript. If I have some after that, I may ask or write you another letter, hopefully with a little better answer. Have a good evening. Everybody. Thank you very much

(Adjourned)